TEE THAN SONG & SONS REALTY SDN BHD A

v.

WATSON PETERS PAUL JOSEPH PETERS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL WAHAB PATAIL J
[CIVIL NO: S1(S6)-22-628-1998]
5 OCTOBER 2007

COMPANY LAW: *Sale of land - Parties - Agreement - Broker - Broker's fee - Refusal of plaintiff company to pay broking fee to broker as promised - Whether plaintiff company had given instructions to first defendant's firm to pay broking fee to broker - Whether governing director of plaintiff company has authority - Whether authorization signed by other directors of plaintiff - Whether plaintiff's claim for balance sum from stakeholders allowed - Evidence Act 1950, s. 73(1)* C D

The plaintiff company, Tee & Sons Realty Sdn Bhd, was a family company headed by Tee Than Song (PW1) ('hereinafter referred to as Tee'). The plaintiff, acting through Tee, intended to sell their land ('the Semenyih land') which was undisputedly sold to Sama Plastic Machinery Sdn Bhd for RM1,830,826.80 which the plaintiff received the 10% deposit of RM183,082.68. The plaintiff's case herein was built around that upon completion of the sale, the plaintiff received, inclusive of the 10% deposit, a total of RM1,500,000. The plaintiff asserted that a balance of RM330,826.80 remained with the stakeholders Messrs Watson Peters & Mohd Fuad ('WPMF') wherein the defendants were partners. The plaintiff further asserted that despite several demands, the defendants refused or failed to pay that said balance sum to the plaintiff, thus this action by the plaintiff. The defendants, however, asserted that Tee had earlier introduced a broker by the name of Tan ('hereinafter referred to as Tan') to the defendants informing the defendants that Tan would act as broker to facilitate the sale of the said Semenyih land. According to the defendants, Tee had promised on behalf of the plaintiff that all he needed from the sale of the land was RM1.5 million and that the plaintiff would not pay the usual broking fee commission, but if the broker could manage to sell the Semenyih land for more than 1.5 million, the amount in excess of RM1.5 million would be for the broker. Tan had found a purchaser but had required the arrangement to be formalized before he would proceed. Upon E F G H I

instructions to prepare a letter of authorization, the first defendant had instructed Seow Swee Fan ('Seow'), a para legal employed in WPMF, to prepare the Letter of Instruction (exh. D4A). The defendants further asserted that Tee had signed the Letter of Instruction in the presence of the first defendant, Tan and Seow. The defendants submitted that it was after the full purchase price was paid that Tee felt that the sum of RM330,826.80 was too high a price to pay as broking fee and tried to wriggle out of his agreement. According to the first defendant, after Tee was paid the monies due to him, Tee had written to the defendants' firm that he was unaware of the contents of Letter of Instruction and that the signature was 'without company directors' particulars' and 'company chop.' Tee further denied signing the Letter of Instruction. The issue that arose herein was whether the plaintiff, acting through Tee, had given the instructions to the first defendant's firm.

Held (dismissing plaintiff's claim):

(1) Tee was not a reliable witness. His testimony was perverse to the evidence before the court. The signatures on the Letter of Instruction was comparable with the signatures of the directors of the plaintiff in the resolution, leading to the conclusion that not only did Tee have the authority as 'governing director' of the plaintiff company which bore his name but that the authorization was also signed by the other directors of the plaintiff with specific direction to pay RM330,826.80 to Tan, that it was given to the defendant firm and acted upon accordingly. (para 31)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another [1995] 3 CLJ 639 CA ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Carapiet v. Derderian AIR [1961] Cal 369 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

For the plaintiff - TK Oh; M/s Oh Teik Keng & Partners
For the defendants - Watson Peters, Ravindran & RS Sodhi; M/s Watson Peters & Mohd Fuad

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail J:

[1] The plaintiff company Tee & Sons Realty Sdn. Bhd. is a family company headed by Tee Than Song (PW1) (hereinafter referred to as "Tee").

[2] On or about late 1996, the plaintiff acting through Tee intended to sell their land held under EMR 3570, Lot 257, Mukim Semenyih (hereinafter referred to as the 'Semenyih land'). It was not disputed that the land was on 26 March 1997 sold to Sama Plastic Machinery Sdn. Bhd. for RM1,830,826.80, that the plaintiff received the 10% deposit of RM183,082.68.

[3] The plaintiff's case is built around that upon completion of the sale, the plaintiff received, inclusive of the 10% deposit a total of RM1,500,000. The plaintiff asserts there was a balance of RM1,830,826,80 – RM1,500,000 = RM330,826.80 remained with the stakeholders Messrs. Watson Peters & Mohd Fuad" ("WPMF"), wherein the defendants were partners. The plaintiff asserts that despite several demands, including a solicitor's letter of 27 November 1997, the defendants refused or failed to pay that balance sum to the plaintiff. It was also asserted that at all times the defendants represented the purchaser while the plaintiff was not represented.

[4] By this action the plaintiff seeks orders for:

(a) Payment of the sum of RM330,826.50 to the plaintiff;

(b) Interest at 8% per annum on the said sum from 27 November 1997 to full settlement;

(c) Costs; and

(d) Such other orders as the court thinks fit.

The Defence

[5] The defendants assert that on or about February 1997, Tee introduced a broker by the name of Tan (hereinafter referred to as "Tan") to the defendants informing the defendants that Tan would act as broker to facilitate the sale of Semenyih land. On or about 5 February 1997, Tee brought Tan to the office of the defendants and promised on behalf of the plaintiff that all he needed from the sale of the land was RM1.5 million. He said that

A the plaintiff would not pay the usual broking commission but if the broker could manage to sell the Semenyih land for more than RM1.5 million, the amount in excess of RM1.5 million would be for the broker.

B **[6]** That Tan found a purchaser but required the arrangement to be formalised before he would proceed. Instruction was given to prepare a letter of authorisation. Upon those instructions, the 1st defendant instructed Seow Swee Fan ("Seow"), a para legal employed in WPMF, to prepare the Letter of Instruction C from the plaintiff to make payment to Tan. The letter of instruction is exh. D4A. The defendants further assert that Tee then signed the Letter of Instruction in the presence of the 1st defendant, Tan and Seow.

D **[7]** On the same day, Tee also executed the resolution shown on p. 17 in the presence of the persons there. Then and having obtained the signatures of the other directors, he returned the authorisation and the resolution to WPMF.

[8] According to the 1st defendant, exh. D4A was read and E explained to Tee and Tan by Seow in Mandarin and it was further explained in Bahasa Malaysia by him.

[9] It was submitted for the defendants that it was after the full purchase price was paid that Tee felt that the sum of F RM330,826.80 was too high price to pay as broking fee and tried to wriggle out of his agreement and Tee had even tried to provoke the broker in the 1st defendant's office and almost caused a brawl but the broker showed remarkable restraint.

G **[10]** According to the 1st defendant, after Tee was paid the monies due to him, by a letter dated 10 October 1997 p. 48 of encl. 48 (exh. P5) Tee wrote to the defendants' firm that he was unaware of the contents of Letter of Instruction dated 5 February 1997 and that the signature was "without company directors' particulars" and "company chop". H

[11] According to the 1st defendant, Tee called him a few days later and requested to see him for a discussion. During discussions with him, Tee snatched a copy of the Letter of Instruction (see p. 50) and walked out of the office. Tee probably thought he had I the original copy.

[12] Then, by letter dated 14 November 1997, Tee instructed his solicitors Messrs. Low Hop Bing, Koh Kong and Associates to write to the 1st defendant to have sight of the original document. The said letter from the said solicitors is shown on p. 14 and 15 of encl. 48.

Issue

[13] The issue is whether the plaintiff, acting through Tee had given the instructions to the 1st defendant's firm. Tee had denied signing the Letter of Instruction, and said he did not know the contents of the letter.

Denial To Signing

[14] Tee had denied signing the Letter of Instruction on p. 50A which according to the 1st defendant was signed before him, Tan and Seow. This requires an evaluation of the surrounding circumstances and the credibility of Tee.

Surrounding Circumstances

[15] In respect of signatures, s. 73(1) of the Evidence Act 1950 provides that a court can compare Tee's signature there with the other signatures he had admitted. Tee's signature appears also at p. 17A, a document that Tee admitted he had signed. A comparison of the signature at p. 50A with Tee's signature on p. 17A, on a document which Tee admitted he signed, shows how similar they are.

[16] Although the plaintiff had many earlier opportunities, the plaintiff did not deny having given the defendants the instructions to pay Tan.

[17] The plaintiff failed to do so in its letter dated 10 October 1997. Neither did it do so in the letter of 11 October 1997. Instead, their solicitor's letter only requested to see the original copy and made no denial.

[18] By a letter dated 22 February 1999, WPMF wrote to the plaintiff's solicitors challenging the plaintiff to deny having given the instructions to pay in clear language. Again, there was no reply or denial. This same letter also contained a paragraph regarding the snatching of the copy of the document from the 1st defendant's hands.

[19] The first time any semblance of a denial was made was in the reply to the defence dated 12 July 1999, about five months after the challenge was made. In para. 3 of the reply, the plaintiff averred that it had not given "proper" instructions "through its Board of Directors". Thus, even then it did not deny that Tee had signed the instructions.

Credibility Of Tee (PW1)

[20] Tee as PW1 admitted he paid the defendant firm RM50,000. But he could not give the reasons for making such payment. He also said he did not give instructions to WPMF to act for the plaintiff in evicting the squatters on the land. When in cross-examination, the 1st defendant put it to PW1 that the sum of RM50,000 was paid by the plaintiff to the defendants to evict squatters from the said land but PW1 denied it completely. But when confronted in cross-examination with the letter from his own solicitors to the Lembaga Hasil Dalam Negeri (Inland Revenue Board) dated 30 March 1998 (p. 43 of encl. 48) which admitted that the sum of RM50,000 was to evict the squatters. The said letter is an admitted document. Even in the face of this agreed letter, PW1 denied that the RM50,000 was paid for the said purpose. This clearly shows that PW1 was stubbornly and deliberately giving false testimony.

[21] Tee was shown the document dated 14 February 1997 (p. 45 and 46 of encl. 48 exh. D9) which he admitted to signing. When asked to explain para. 5d of the said document, his reply was that he did not understand it. Tee also tried to give the impression that he was an innocent and naive person who was cheated of the sum claimed. In examination-in-chief, he gave evidence that it was the broker Tan who introduced him to the 1st defendant's firm and that he had no prior dealing with the 1st defendant. In cross-examination, however, he had to concede that he had prior dealings and that it was he who introduced Tan to the 1st defendant.

Authority Of Tee

[22] In Question 26 of the examination-in-chief, Tee stated *inter alia* that he has no authority to exercise the powers vested in the Board of Directors of the plaintiff company and that the plaintiff company is not under his control.

[23] However, he was the "Governing Director" in the company. Article 77A (b) and (f) of the articles of the plaintiff company at p. 30 of encl. 48 provides:

> (b) Whilst the said TEE shall retain the office of Governing Director he shall have authority to exercise all the powers, authorities and discretions by these presents or by the Act expressed to be vested in the Directors generally and all the other Directors for the time being of the company shall in regard to the conduct of the company's business be under his control and bound to conform to his directions and in exercising such authorities and discretions as aforesaid it shall not be necessary for him to describe himself as being or as acting in the capacity of Governing Director.
>
> (f) Whilst the said TEE holds the office of Governing Director, no resolution of the Board of Directors or the Company in General Meeting shall be deemed to have been passed unless such resolution shall have been approved in writing by the Governing Director.

These articles clearly provide that the said Tee has full authority to exercise all the powers vested in the Board of Directors of the plaintiff company and that the plaintiff company is completely under his control. Even when referred to these articles Tee denied that he was in control of the plaintiff company.

[24] The evidence before this court thus shows that:

(a) The plaintiff was a family company, which carried the full name of Tee.

(b) The other directors were his children and his wife.

(c) That as Governing Director he had complete control of the company in that:

i) He held the office of Governing Director till his death; and

ii) He could exercise all the powers vested in the other directors by the articles or the Companies Act 1965;

iii) No resolution could be passed by the other directors without his written approval.

[25] In practice, therefore, the other directors had to be under his control and conform to his directions. He was, for all intents and purposes, the alter-ego of the company.

[26] The court concludes that Tee is not a witness who can safely be believed.

Failure By Plaintiff To Cross-Examine On Material Issues

[27] The plaintiff had completely failed to put his essential and material case in cross-examination to the defendants. In particular, the plaintiff did not challenge following material testimony of the defendants that:

a) The plaintiff in dealing with the defendants was represented by Tee.

b) The plaintiff wanted to sell a piece of land for RM1.5 million and Tee brought Tan, a broker to the defendant's office and introduced Tan as the plaintiff's broker.

c) Tee informed the defendants that the plaintiff did not want to pay Tan any commission for the sale of the land but if Tan sold the land for more than RM1.5 million Tan could keep the difference.

d) On or about 5 February 1997 Tan and Tee came to the defendants' office and Tan informed Tee and the 1st defendant that Tan had found a purchaser for the land and Tan wanted the arrangement in writing from the plaintiff before introducing the purchaser.

e) At the material time Seow was a para legal employed in the defendants' firm.

f) On the instruction of Tee, and after referring to the 1st defendant, Seow prepared the Letter of Authority (exh. D4).

g) The 1st defendant explained the contents of the letters of authority in Bahasa Malaysia to Tee and to Tan. Seow also explained the contents of the Letter of Authority to both Tee and Tan in the presence of the 1st defendant.

h) Tee then signed the said Letter of Authority in the presence of the 1st defendant. The 1st defendant told him to bring the other directors to the defendants' office to sign the said Letter of Authority but he complained about the inconvenience of

bringing every one together particularly his wife who he said was rather aged and frail. The 1st defendant then allowed him to take the Letter of Authority back and to get the other directors of the plaintiff to sign the same.

i) On the same day the 1st defendant also asked Seow to prepare the resolution at p. 17 of encl. 48 and Tee signed the resolution in the presence of the 1st defendant. This resolution was also taken back to be signed by the other directors.

j) Tee brought back both the resolution and the Letter of Authority which Tee said had been signed by the other directors of the plaintiff.

k) On or about October 1997 and after the full purchase price had been received by the defendants' firm and when the balance was to be paid to the plaintiff and Tan his share, Tee came to see the 1st defendant and expressed unhappiness as to the size of the payment to Tan. Tee told the 1st defendant that it was unfair that as owner of the land the plaintiff should receive RM1.5 million and the broker, for merely facilitating the sale, should receive RM330,000.

l) The 1st defendant responded to him was, that was what the plaintiff had agreed. The 1st defendant offered to invite Tan and Tee to the defendants' office for discussion.

m) On or about 9 October 1997 both Tee and Tan came to the defendants' office but Tee was abusive to Tan, shouting obscenities in Malay and Chinese and it almost ended up in a brawl. Tee then left the office rather angrily.

n) The instructions contained in the resolution dated 5 February 1997 at p. 50 of encl. 48 was given by the plaintiff to the defendants and it provides:

> We the directors of Tee & Sons Realty Sdn. Bhd. hereby authorise you to release RM330,826.80 to Tan (NRIC NO: 460922-105499) upon the release of the full purchase price by the above buyer to us for his services towards the successful sale of the above property. You are to retain RM16,541.30 to pay Real Property Gains Tax.

[28] In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another* [1995] 3 CLJ 639 the Court of Appeal referred to the rule in *Browne v. Dunn* [1893] 6 R 67 which had been applied by Indian Courts in the context of the Indian Evidence Act 1972 and to the case of *Carapiet v. Derderian* AIR [1961] Cal 369 where Mukharji J expressed the principle in the following words:

> The law is clear on the subject wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all it is wrong to think that this is merely a technical rule of evidence. It is rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiffs springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[29] The same principle was applied by the Court of Appeal in *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545.

[30] It is noted that the 2nd defendant adopted the entire evidence-in-chief of the 1st defendant and in this respect the plaintiff had also conceded that it was not necessary for the 2nd defendant to be cross-examined by the plaintiff.

[31] From the foregoing, it is evident that Tee is not a reliable witness. His testimony is perverse to the evidence before the court. The court finds that signatures on the Letter of Instruction dated 5 February 1997 (p. 50A) are comparable with the signatures of the directors of the plaintiff in the resolution, leading to the conclusion that not only Tee having authority as "Governing Director" of the plaintiff company which bears his

name but that the authorisation was also signed by the other directors of the plaintiff with specific direction to pay RM330,826.80 to Tan, that it was given to the defendant firm and acted upon accordingly.

[32] The plaintiff's claim was, therefore, dismissed with costs.